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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 830

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. _____

GRAND RIVER DAM AUTHORITY, a Body Corporate,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Grand River Dam Authority, a body corporate under the laws of the State of Oklahoma, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on October 6, 1965.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Oklahoma (R. 52 and 57) has not been reported and the opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. It is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was made and entered on October 6, 1965, and a copy is appended to this Petition following the opinion of the Court of Appeals in the Appendix. A Petition for Rehearing was denied on November 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether it is proper for a Court of Appeals to base its ruling upon an argument not suggested, urged, briefed or even anticipated by the parties to the proceedings before it.

2. Whether petitioner is authorized, in establishing and collecting utility rates pursuant to the Grand River Dam Authority Act, to establish contingency and depreciation funds.

3. Whether the legislature of Oklahoma can impliedly sanction actions of an agency created by it which violate an express provision of the Oklahoma Constitution.

4. Whether the Court of Appeals erred in interpreting the provisions of Article 18, §7 of the Oklahoma Constitution.

STATUTES INVOLVED

Section 8 of the Grand River Dam Authority Act, 1933 Okl.Sess.Laws, Ch. 70, p. 354, 82 Okl.St.Ann. §868, is the statute applicable to this case. This section of the Grand River Dam Authority Act has not been amended since its adoption in 1935. Pertinent portions are printed

in the text of this petition. The entire section appears in the Appendix.

Article 18, §7 of the Constitution of the State of Oklahoma is cited in the text.

STATEMENT OF THE CASE

Petitioner is a conservation and reclamation "District" established by the legislature of the State of Oklahoma in the Grand River Dam Authority Act of 1935, Okl.Sess.Laws 1935, Ch. 70, pp. 350-358, 82 Okl.St.Ann. §§861-880, primarily to build and operate a hydroelectric dam upon the Grand River in Northeastern Oklahoma. It is Oklahoma's largest State-owned utility and is the principal supplier of electric power to municipalities, industries and electrical cooperatives in fifteen counties of Northeastern, Oklahoma. In operating its plants and facilities it exercises sovereign power of the State of Oklahoma and its directors, officers and employees are the agents and employees of the State of Oklahoma.[1]

Article 18, §7 of the Constitution of the State of Oklahoma provides, *inter alia,*

> "Nor shall the power to regulate the charges for public services be surrendered. . ."

and Section 8 of the Grand River Dam Authority Act, 82 Okla.St.Ann. §868, requires petitioner (referred to in the Act as the "District"), by its Board of Directors, to:

> ". . . establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished or supplied by the District which fees and charges shall

1. *International Brotherhood of Electrical Workers* v. *Grand River Dam Authority*, 292 P.2d 1018 (1950); *Sheldon* v. *Grand River Dam Authority*, 182 Okl. 24, 76 P.2d 355 (1938).

be reasonable and non-discriminatory and sufficient to produce revenue adequate:

a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

b) To pay the interest on and principal of all bonds issued under this Act (the Grand River Dam Authority Act) when and as the same shall become due and payable;

c) To pay all sinking fund and/or reserve payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable;

d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c) and (d), above, the Board shall establish a reasonable depreciation and emergency fund and retire (by purchase and cancellation or redemption) bonds issued under this Act. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act."

On November 6, 1950, petitioner entered into a contract (hereinafter referred to as the "Contract") with respondent (later amended on April 6, 1951) under which petitioner agreed to furnish respondent's requirements of electric power and energy, water, steam and compressed air (R. 6-19, 20-21). The term of the Contract was for a period of twenty-five years.

With respect to rates for electricity and electrical energy, the Contract expressly provided that rates might be from time to time changed by petitioner "only as pro-

vided in the Grand River Dam Authority Act" but that such rates should at all times be "reasonable and non-discriminatory and shall be adequate but not in excess of what may be necessary to fulfill the obligations imposed upon [petitioner] by said Act." The Contract contained no similar provisions dealing with changes in rates for water, steam and compressed air.

On the basis of studies and reports which indicated that the rates being received by petitioner for the sale of electricity, water, steam and compressed air were insufficient to provide the revenues required by the Grand River Dam Authority Act, the Directors of petitioner adopted Resolution No. 3890 (R. 33-40) on January 5, 1960, promulgating new and increased schedules of rates for electricity, water, steam and compressed air. On April 20, 1964, the Directors promulgated Resolution No. 4123 (R. 41-50) further increasing the rates for all utility services. Respondent paid the increased rates under protest and filed this action in the U.S. District Court for the Northern District of Oklahoma seeking refunds for the rates paid for water, steam and air and a determination that petitioner had no authority to change the rates for water, steam or air. No complaint was made as to the increased rates for electricity and respondent did not complain that the rates for water, steam or air were discriminatory or unreasonable—only that petitioner had no power to change such rates at all (See Complaint at R. 1-5). Jurisdiction was based upon diversity of citizenship. When it became apparent that respondent's claims were based solely on the question of petitioner's power, under any circumstances, to make any changes in the rates for water, steam and air, petitioner moved for summary judgment (R. 32) and respondent also moved for summary judgment (R. 51).

The District Court (Bohannon, J.) granted respondent's Motion for Summary Judgment (R. 67) and filed an Order (R. 52-57) indicating that his ruling was based upon the premise that any attempted change in rates for water, steam or air by petitioner would "impair the obligation of [respondent's] contract with [petitioner]" (R. 56).

Petitioner appealed to the Court of Appeals for the Tenth Circuit urging that the provisions of Article 18, §7 of the Oklahoma Constitution, *supra,* precluded it from making any effective contract which would bar proper rate adjustments for utility services when changes should become necessary to maintain revenues adequate for the purposes specified in Section 8 of the Grand River Dam Authority Act, 82 Okl.St.Ann. §868, *supra.*

The Court of Appeals affirmed the judgment of the District Court holding: (1) that the Oklahoma legislature had impliedly approved an administrative construction of the Grand River Dam Authority Act recognizing petitioner's authority to execute long term contracts which do not reserve power to make appropriate rate adjustments; (2) that Article 18, §7 of the Oklahoma Constitution did not apply to petitioner because municipally owned utilities are excluded from the definition of the word "utility" in a statute (17 Okl.St.Ann. §152) which established a regulatory agency to supervise the rates of privately owned utility companies; (3) that when petitioner's Directors in 1950 approved the Contract they had "exercised" (to the exclusion of any later power of review) the legislative rate authority delegated by the Grand River Dam Authority Act; and (4) that petitioner had improperly accrued depreciation and contingency funds in deficit years and had no authority to accrue such reserves except out of excess earnings.

The latter holding is relied upon primarily as the basis for this petition for certiorari because neither party to the action had even suggested any such argument or remotely anticipated such an unsolicited ruling and because the ruling may well jeopardize petitioner's right to collect rates sufficient to establish reserve funds specifically provided for in its outstanding bond indentures.

Petitioner is frank to state that although it regards the opinion of the Court of Appeals as manifestly erroneous in all respects, the errors would not ordinarily give rise to questions entitled to review in this Court by certiorari except for the drastic effects of that part of the Court's opinion which deals with the reserve funds petitioner is legally entitled to establish. That ruling was volunteered by the Court of Appeals sua sponte and without any thought as to its possible effect. Its effect is startling and extends far beyond the instant controversy. It casts doubt on the validity of reserve funds, established for many years under the specific terms of bond indentures. It will imperil petitioner's rights in other rate cases now pending and may well affect future bonds to be issued by the Authority. The ruling perils the economic and industrial future of all of Northeastern Oklahoma at a time when the Legislature is not scheduled to meet until 1967, and legislative relief can not be had until such time.

REASONS FOR GRANTING THE WRIT

A. The Ruling Concerning Petitioner's Right to Establish Reserves Presents a Question of Importance upon Which Petitioner Should Have a Fair Hearing.

Petitioner has already suggested that the surprise holding of the Court of Appeals and the far-reaching and drastic consequences of that ruling are the principal basis for this petition for certiorari. The holding transcends the merits of this particular controversy. By affecting the validity of the reserves which petitioner has established, the opinion affects the entire debt structure of petitioner. With major expansion projects well launched, petitioner is now faced with a challenge going to the very heart of its allowable revenues.

In most cases, this court is right to insist that it not be burdened with cases which merely call upon it to make another judgment as to the correctness or error in non-federal rulings already thoroughly argued and briefed by two lower tribunals. The parties have had their day in court—usually twice. In the instant case, however, petitioner's only day in court on the ruling which most vitally affects its future (and the economic future of a major area of the State of Oklahoma) consisted of a chance to call the attention of the Court of Appeals to its error on a Petition for Rehearing (cursory review at best).[2]

---

2. Review on a Petition for Rehearing in situations where the Court has offered several grounds to support an opinion is most unsatisfactory. Even if the Court of Appeals has become convinced that it erred in one or more respects, it will tend to deny the Petition for Rehearing without comment on the basis that the judgment is supported by other grounds. Such action may leave in force an opinion announcing an erroneous rule of law which has far reaching and tragic consequences. Petitioner suggests that this is what has occurred in the instant case.

Petitioner feels that if it can demonstrate clear and manifest error in the Ruling of the Court of Appeals in its "volunteered" ruling concerning the establishment of proper reserves, the writ of certiorari should be granted in this case even if the Court of Appeals be correct in its other rulings, none of which are nearly so grave or significant to petitioner or the citizens it serves. Petitioner would like to show why the Court of Appeals could not, on the record in this case, have decided the question of what reserves petitioner may establish.

All of petitioner's rate making authority is derived from the above quoted provisions in Section 8 of the Grand River Dam Authority Act. This section requires petitioner not only to establish, but to *collect*, rates which *"shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate*:

"a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

c) To pay all sinking fund *and/or reserve fund payments agreed to be made in respect of any* . . . bonds, and payable out of such revenues, when and as the same shall become due and payable; and

d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf." (Emphasis added)

Thus, under the plain and unambiguous language of the Statute, petitioner is not only authorized, but commanded, to establish *and collect* rates sufficient for such reserve fund payments which may be required in respect to its outstand-

ing bonds. Petitioner is a party to an elaborate bond Indenture which requires mandatory payments to the challenged depreciation and contingency funds but the Indenture was not before the District Court or the Court of Appeals. If petitioner could have introduced the Indenture into the record on its Petition for Rehearing in the Court of Appeals, it would, of course, have done so. Since no one but the panel of the Court of Appeals which heard the case even remotely suspected (or could have suspected) that this issue would arise, the Indenture had not been made a part of the record—nor did the issues framed by the pleadings suggest that it might become relevant.

The Court of Appeals ignored completely the statutory provisions quoted above and commenced its analysis with the statutory words following the really relevant ones. It is true that the sentence following the quoted portion of 82 Okl.St.Ann. §868(d) refers to reserves which are to be established. . . "Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c) and (d)." The latter sentence is, however, operative only after petitioner's rates have brought it sufficient revenues to establish those funds which the Grand River Dam Authority Act absolutely requires it to establish (funds required by its indentures and agreements with bondholders).

The irresponsible action of the Court of Appeals in interjecting this issue into the controversy without any proper foundation or hearing makes this a proper case in which this Court should exercise its general supervisory authority over the administration of justice in the Federal Courts.

B. The Court of Appeals Erred in Ruling That the Oklahoma Legislature Had Impliedly Ratified the Contract.

The opinion of the Court of Appeals held that since the Oklahoma Legislature had amended the Grand River Dam Authority Act in 1955 (Oklahoma Session Laws, 1955, p. 562) without taking any action concerning petitioner's contracts, it had impliedly ratified an administrative construction of the Grand River Dam Authority Act under which petitioner did have the authority, by contract, to put rates for water, steam and air beyond review for long periods of time.

This holding is incorrect because there is no evidence that any of petitioner's contracts ever came to the attention of the Legislature. Petitioner does not publish "reports" concerning its contracts or report them to Legislature periodically nor have there been any prior controversies concerning the instant aspect of any of petitioner's contracts which might have focused legislative attention upon the subject. In the absence of some indication that the question could have come to the attention of the Legislature, or even one of its minor committees, it is absurd to presume any legislative ratification, implied or otherwise, of petitioner's contracts.[3]

---

3. The Oklahoma Supreme Court is familiar with the fact that few of the State's administrative agencies publish reports or otherwise communicate regularly with the Legislature and has not recognized the doctrine of implied legislative ratification of administrative action. This explains why the only authority the Court of Appeals was able to muster to support its holding of implied legislative ratification was a reference to a dissenting opinion by a Justice of the Supreme Court of Oklahoma. (The citation to *Realty Mortgage & S. Co.* v. *Oklahoma Employment Sec. Com'n*, 197 Okl. 308, 169 P.2d 761, 770, in Footnote 3 of the opinion of the Court of Appeals is a reference to the dissenting opinion of Vice Chief Justice Hurst.) Petitioner does publish financial reports which show its reserves and the annual allocations thereto. Thus, if the legislature has impliedly ratified or sanctioned any administrative practice, it has ratified petitioner's practices of allocating funds to depreciation and contingency reserves.

Certainly neither the 1955 or 1957 amendments to the Grand River Dam Authority Act dealt with the subject of contracts or rates. These amendments changed the composition of petitioner's Board of Directors, their terms of office and compensation, the location of the principal office and increased the amount of bonds petitioner might issue, but did not in any manner involve petitioner's rate structure or its contract authority.

In any event, however, the Oklahoma Constitution prohibits any one on behalf of the State from contracting away the State's sovereign power to regulate the charges for public services. Article 18, §7 provides:

> "Nor shall the power to regulate the charges for public services be surrendered; . . ."

The Oklahoma Supreme Court has applied this constitutional provision to bar attempts by municipalities to contract with private utilities and place rates for utility services beyond the reach of the State's continuing, sovereign power of regulation. *Bartlesville* v. *Corporation Commission,* 82 Okl. 160, 199 Pac. 396 (1921); *City of Pawhuska* v. *Pawhuska Oil & Gas Co.,* 64 Okl. 214, 166 Pac. 1058 (1917), *error dismissed,* 250 U.S. 394, 39 S. Ct. 526, 63 L. Ed. 1054. The Court of Appeals ignored the Constitutional provision by finding that petitioner was not a "utility" as defined in the Statute which created a Corporation Commission and delegated to it the power to regulate utility charges of privately owned utilities. 17 Okl.St.Ann. §151 *et seq.*

This merely misconceives the regulatory scheme adopted in Oklahoma. The Corporation Commission of Oklahoma exercises rate-regulatory authority over privately owned utilities. The Legislature has not seen fit to commit the regulation of rates by municipally owned and

publicly owned utilities to the same body which regulates private utilities. This scheme does not represent a legislative determination that petitioner's charges for its services are not "charges for public services" under the Constitutional provision.

When petitioner was established as a body politic and as an agency of the State in the Grand River Dam Authority Act, the Oklahoma Legislature plainly recognized that its charges were subject to Article 18, §7 of the Constitution. The last paragraph of Section 8 of the Grand River Dam Authority Act, 82 Okl.St.Ann. §868, immediately follows the paragraphs and subparagraphs which prescribe the rates petitioner must charge. It reads:

> "Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged." Laws 1935, p. 354, §8.

This paragraph is a clear reference to Article 18. §7 of the Oklahoma Constitution and is a recognition by the Legislature that it was as powerless to surrender the State's

rate making authority as petitioner or any other party would be.

Finally, the parties themselves recognized that by virtue of the Oklahoma Constitution and the Grand River Dam Authority Act, petitioner had a continuing duty to change its rates from time to time to keep them in compliance with the legislative mandate. Respondent has paid the increased electric rates without question[4] and has challenged only the increased rates for water, steam and air. Yet the provision of the Contract (paragraph No. 16, R. 9) which authorizes changes in electric rates recognizes that petitioner has an *obligation* to make changes. It provides:

> "Rates Subject to Change
>
> 16. The schedule of electric rates and charges as herein set forth may be changed by the Authority from time to time only as provided by the Grand River Dam Authority Act (Title 82, Sec. 861 et seq., O. S. 1941, as amended and supplemented as of the date on which this agreement is executed by the Authority), which rates and charges shall at all times be reasonable and nondiscriminatory and shall be adequate but not in excess of what may be necessary to fulfill the *obligations* imposed upon the Authority by said Act. Any change in the Authority's schedules of rates shall be applied to all customers of the Authority in a reasonable and nondiscriminatory manner. The Authority's costs of redeeming bonds prior to maturity will not be considered as a part of operating costs and electric rates

4. Respondent's action in raising no question concerning the increased rates for electricity is certainly no less than an admission on its part that the revenues received by petitioner had become insufficient for the statutory purposes. Absent such a situation, petitioner could not have raised electric rates as the contract with respondent permitted petitioner to raise rates only in such a situation. Respondent's admission in this respect also explains why petitioner could not reasonably have anticipated a ruling by the Court of Appeals which finds, in effect, that petitioner's revenues were adequate without any raise in rates.

hereunder will not be increased for this purpose." (Emphasis added)

The error of the Court of Appeals in the above respect, together with its much graver error in ruling upon the reserves petitioner is legally entitled to establish justifies an exercise of this Court's reviewing authority.

C. The Court of Appeals Erred in Deciding That the Twenty-Five Year Contract Was an Exercise of the State's Rate-Making Authority Which Was Binding for Such Term.

The Court of Appeals decided that petitioner was obligated "at the time the contract was entered into to determine what rates in its [petitioner's] considered judgment would be adequate to meet the requirements of §868 during the term of the contract and fix the applicable rates accordingly." The Court stated that the fact, if it be a fact, that actual experience showed the initial judgment to have been faulty over the life of the Contract "does not retroactively make the initial determination improper or unlawful and does not render void the contract rates."

Petitioner does not contend that the contract is meaningless or "retroactively void." It contends that the contract rates remained valid at all times until that time *when such rates were no longer adequate to meet the statutory requirements of the Act.* Precisely at that time petitioner had a duty under the statute to make appropriate changes to bring the rates into line with the statutory mandate which required petitioner, not only to establish, but to collect, rates and other charges sufficient to produce revenue adequate for the purposes set forth in the Grand River Dam Authority Act. Petitioner was prepared to meet the burden of showing that the contract rates were no longer adequate for such purposes and that

the rates for water, steam and air had become discriminatory in that such rates were not bearing their fair proportion of petitioner's costs. When respondent took the position in the District Court that the only question involved was the legal right of petitioner to change rates for water, steam and air for any reason at all, both parties moved for summary judgment and such proof became unnecessary.

The result of the opinion of the Court of Appeals is to force petitioner to maintain until 1975 discriminatory rate schedules under which all users of electricity must unfairly bear the burden of its losses in furnishing water, steam and air to respondent. Since the opinion of the Court of Appeals was announced, the City of Pawnee, Oklahoma, has amended its pleadings in a suit between it and petitioner in the District Court of Pawnee County, Oklahoma, to allege that it is being required to bear an unfair portion of petitioner's costs of service by reason of the unreasonably low rates charged to respondent for water, steam and air. Other users have threatened similar action so that the opinion of the Court of Appeals has jeopardized petitioner's entire rate structure as well as its debt structure. The matter thus affects the entire population and economy of Northeastern Oklahoma, which is wholly dependent upon petitioner for major utility services.

The purpose of Article 18, §7 of the Oklahoma Constitution was to prevent officers and agents of the State from binding the State and its agencies to contracts which put review of utility rates beyond review. The effect of the opinion of the Court of Appeals is to do just that—to put the rates charged to respondent completely beyond review until 1975.

There can be no question but that respondent was fully charged with notice of all limitations upon the authority of petitioner and its officers, as agents and employees of the sovereign, *Rock Island, Arkansas & Louisiana R. Co.* v. *United States,* 254 U.S. 141, 41 S. Ct. 55, 65 L. Ed. 188 (1920); *United States* v. *City and County of San Francisco,* 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940); *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941), and that the sovereign is not bound by rules of estoppel or apparent agency when its officers exceed limitations upon their authority. See *Federal Crop Insurance Corporation* v. *Merrill,* 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 (1947). The provisions of Article 18, §7 of the Oklahoma Constitution and the rate standards of the Grand River Dam Authority Act are clear and unambiguous limitations upon petitioner's authority to make contracts establishing rates which, either initially or subsequently, fail to meet the legislatively established standards.

It is equally clear that contracts establishing utility rates do not put the rates so established beyond the sovereign power of the State to abrogate them, *Union Dry Goods Co.* v. *Georgia Public Service Corp.,* 248 U.S. 372, 39 S. Ct. 117, 62 L. Ed. 309 (1919); *Midland Realty Co.* v. *Kansas City Power & Light Co.,* 300 U.S. 109, 57 S. Ct. 345, 81 L. Ed. 540 (1937), and this Court has recognized the well established rule that the surrender, by contract, of a power of government, is a very grave act requiring specific authority which must "clearly and unmistakably appear". *Home Telephone & Telegraph Company* v. *Los Angeles,* 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908).

The opinion of the Court of Appeals ignores, even violates, these settled principles of law which protect the State against the acts of its agents who exceed the authority committed to them.

CONCLUSION

The ruling of the Court of Appeals far transcends this particular case. The most serious, and demonstrably erroneous, portion of its ruling may well prove chaotic in its effect upon the economy of a large portion of a sovereign State. Rulings which have such effect should be accorded at least one review even though the substantive question may be one of State law. This court has a continuing concern for the manner in which justice is dispensed in the Federal appellate Courts. The case, therefore, is one of those cases where the Court of Appeals has so departed from settled rules of State law as to justify a hearing on certiorari and the writ should be granted.

Respectfully submitted,

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United States Court of Appeals

TENTH CIRCUIT

No. 8063

GRAND RIVER DAM AUTHORITY,
a body corporate,
Appellant,

v.

NATIONAL GYPSUM COMPANY,
a corporation,
Appellee.

Appeal from the United States District Court
for the Northern District of Oklahoma

(Filed United States Court of Appeals, Tenth Circuit,
October 6, 1965, /s/ Robert O. Cartwright,
Clerk.)

James R. Ryan (Q. B. Boydstun, Horace D. Ballaine, Hess Crossland, and Conner, Winters, Randolph & Ballaine were with him on the brief) for Appellant.

Remington Rogers (Rogers, Donovan & Rogers were with him on the brief) for Appellee.

Before PHILLIPS, LEWIS and BREITENSTEIN, Circuit Judges.

PHILLIPS, Circuit Judge.

National Gypsum Company[1] brought this action against Grand River Dam Authority[2] to recover excess

1. Hereinafter called National.
2. Hereinafter called the Authority.

charges alleged to have been paid under duress by National to the Authority for water and steam furnished National by the Authority under the written contract referred to hereinafter. Both parties moved for a summary judgment. From a summary judgment in favor of National, the Authority has appealed.

The Authority is a conservation and reclamation district created by the Oklahoma Legislature in 1935 to provide flood control and to store, preserve and distribute "the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of the forests, water and hydro-electric power of the State of Oklahoma." (Session Laws of 1935, Chapter 70, Article 4, § 1)

The contract above referred to was entered into between the Authority and National on November 6, 1950, and in part here material provides:

> "Whereas, the Consumer [National] plans to locate, construct, maintain, and operate an industrial plant or plants upon and/or adjacent to the Authority's Chouteau Steam Plant property at the Oklahoma Ordinance Works near Pryor in Mayes County, Oklahoma; and
>
> "Whereas, the Consumer will require for use in operating and maintaining said plant or plants electric power and energy, processed steam, raw and treated water, compressed air, and certain sanitation facilities; and
>
> "Whereas, the Authority is able and can furnish to the Consumer its requirements of electric power and energy, processed steam, raw and treated water, compressed air and certain sanitation facilities;
>
> * * * *

"Article I

Electric Power and Energy

"Service

1. The Authority shall sell and deliver to the Consumer, and the Consumer shall purchase and receive from the Authority electric power * * * all in accordance with the terms and conditions of this Contract.

* * * *

"Rates

8. The Consumer agrees to pay the Authority monthly, each month during the period of this Contract for power and electric energy, in accordance with the following schedule of rates:

* * * *

"Article II

Water

"Service

1. The Authority shall sell and deliver to the Consumer the Consumer's requirements of (1) treated water * * * and (2) raw water * * *.

* * * *

"Rates

3. Consumer agrees to pay the Authority * * * for water in accordance with the following schedules of rates:

* * * *

"Article III

Steam

"Service

1. The Authority shall sell and deliver to the Consumer and the Consumer shall purchase and re-

ceive from the Authority the Consumer's requirements of dry saturated steam * * *.

* * * *

"Rates

3. The Consumer agrees to pay the Authority monthly each month during the period of this Contract for said dry saturated steam at the rate of 20¢ per thousand pounds of steam delivered in accordance with Consumer's requirements provided no monthly bill for dry saturated steam shall be less than $2,500.00.

"Article IV

Compressed Air

"Service

1. The Authority shall sell and deliver to the Consumer, and the Consumer shall purchase and receive from the Authority the Consumer's requirements of compressed air * * *.

* * * *

"Rates

3. The Consumer agrees to pay the Authority monthly each month during the period of this Contract for said compressed air at the rate of 3¢ per thousand cubic feet of free air.

* * * *

"Article VI

General

* * * *

"Term of Agreement

9. This contract shall become effective on the complete execution of the same and shall continue

from this effective date for a period of twenty-five (25) years. It will thereafter remain in effect until cancelled by two (2) years' written notice by either party. * * * Nothing herein contained shall be construed as limiting the rights of modification or termination at any time as specified in the contract. It is further understood that each of the services under this contract shall be contingent upon the erection by consumer of the industrial plant hereinbefore described and shall begin on the dates required by the Consumer for its production operations.

* * * *

"Most Favored Consumer Clause

14. The Authority shall give the Consumer notice of, and shall give the Consumer the benefit of, any lower rate schedules and/or more favorable terms and/or more favorable conditions of purchase made available to any of its other industrial customers of the same class at any time during the terms of this agreement."

The contract provides that the schedule of electric rates and charges set forth in the contract may be changed by the Authority from time to time but that such rates and charges shall at all times be reasonable and nondiscriminatory and shall be adequate but not in excess of what might be necessary to fulfill the obligations imposed upon the Authority by the Act under which it was created. The contract contains no provision for changing the rates for water, steam and compressed air and under the provisions of the contract the charges therefor were to remain unchanged during the life of the contract.

By resolution adopted January 5, 1960, the Authority increased its rates for electric power, steam and water to be effective April 1, 1960. Such resolution in part provided:

"Whereas, Section 7.10 of the Indenture, entered into between the Authority and the Marine Midland Trust Company of New York, as Trustee, dated as of October 1, 1948, as follows:

"'The Authority covenants that it will, * * * prepare, adopt and file with the Trustee * * * a schedule of rates, tolls, rents and other charges for electrical energy and for any and all other commodities, services and facilities to be furnished or supplied by the Authority from the System, which are fair, reasonable and nondiscriminatory, and which are calculated on the basis of all available estimates (and with due allowance for contingencies) to yield funds at least sufficient:

"'(a) To meet the requirements of Article IV with respect to the amount from time to time to be set aside in each of the special funds provided for in Article IV; and

"'(b) To meet all other obligations of the Authority hereunder or otherwise.'"

National was advised by the Authority of such rate changes applicable to it and National thereafter paid such increased rates on water and steam under protest.

By resolution adopted April 20, 1964, the Authority again increased its rates for electric power, water and steam to be effective July 1, 1964. That resolution in part provided:

"Whereas, Section 8.1 C of the Grand River Dam Authority's Bond Resolution No. 4010 creating and establishing an issue of $50,000,000 in Revenue Bonds, adopted December 5, 1961, is as follows:

"'The Authority shall fix, establish, maintain and collect rates and charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through the facilities of

the system, which shall be fair and nondiscriminatory and adequate to provide the Authority with revenues sufficient to pay the costs of the proper operation, maintenance and repair of the System, and also for the payment of all costs, expenses and charges specified in paragraph B above, and any and all other amounts which the Authority may now or hereafter become obligated to pay or set aside from said revenues by law or contract.'"

The Authority advised National of the last-mentioned change in rates applicable to it and National thereafter paid the increased rates for water and steam under protest.

On September 17, 1964, National filed its complaint in this action in which it alleged that the increase in rates of water and steam by the Authority was a breach of the contract and that it paid such rates for water and steam furnished it under protest. It further alleged that prior to March, 1950, it was operating numerous plants economically located for sources of raw material and for economical transportation of its finished products to various markets throughout the United States, and that to meet the growing needs of its business National, prior to March, 1950, decided to locate a new paper plant at some convenient point in northeastern Oklahoma; that as a result of negotiations between the Authority and National, the Authority agreed to sell to National a certain industrial site for the construction of such paper plant, and as a part and parcel of such transaction, to induce National to purchase such industrial site and construct its plant thereon and to become a customer of the Authority, the Authority agreed to furnish National with its requirements of electrical energy and agreed to sell to National its requirements of water, steam and air under the specific

terms and conditions set forth in the contract referred to above.

National further alleged that in reliance upon such contract and the performance thereof by the Authority, National purchased the industrial site from the Authority and at great expense constructed a substantial plant thereon and from the date of its completion has continued to operate such industrial plant; that in the operation thereof, National continuously requires not only a dependable source of electric power but also steam, water and air in substantial quantities; and that it is necessary for National to operate such plant continuously to enable it to perform its contract with its various customers.

The trial court held that the Authority had plenary power to operate, manage and conduct its business including the power to establish rates and charges for water and steam to be furnished by it for a definite term, and that it had the power to enter into a contract to furnish water and steam at such rates throughout such term. It concluded that the rate changes which the Authority undertook to make in 1960 and 1964 violated the contract referred to above.

82 Okl. St. Ann. § 868 provides as follows:

> "The Board [of the Dam Authority] shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:
>
> "(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

"(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

"(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

"(d) to fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire * * * bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

"Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c) and (d) of this Section * * *, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged."

82 Okl. St. Ann. § 862(n) grants to the Authority the power "to make contracts and to execute instruments necessary or convenient to the exercises of the powers, rights, privileges and functions conferred upon it."

On December 18, 1950, the Authority entered into a contract with the City of Pryor, Oklahoma, for the sale of water at specified rates for a definite term. That contract made no provision for changing such rates during the term. On January 9, 1951, it entered into a contract with the Coronado Manufacturing Company for the sale of electric energy, steam and water for specified rates set forth in the contract. That contract provided for the changing of the rates for electric energy by the Authority but made no provision for changing the rates for water and steam which were fixed for a definite term under the contract. And on October 3, 1952, the Authority contracted with the City of Chouteau, Oklahoma, for the sale of water for a definite term, at rates specified in the contract. That contract contains no provision for the changing of the rates by the Authority and such rates were fixed for a definite term by the contract.

While the Authority also entered into other contracts in which it reserved the power to change rates, it is clear that the Authority in 1950, 1951 and 1952, construed Section 868, supra, as giving it the power to establish rates and charges for water and steam for a fixed period and Section 862(n), supra, as giving it the power to contract to furnish water and steam for such fixed period at such unchangeable rates. The Act creating the Authority and defining its powers was amended in 1955 (Oklahoma Session Laws, 1955, p. 474) and again in 1957 (Oklahoma Session Laws, 1957, p. 562). In neither of such amendatory acts did the Legislature amend or change Section 862(n), supra, or limit or take away the power of the Authority to establish and

contract for fixed rates for a definite period which the Authority had theretofore exercised and which constituted an administrative construction of the Act. The Legislature therefore impliedly approved such administrative construction of the Act made by the Authority.[3]

The Authority contends that Article 18, Section 7 of the Oklahoma Constitution[4] prohibits it from entering into a contract which establishes fixed rates, relying upon City of Bartlesville v. Corporation Commission, 82 Okl. 160, 199 P. 396; City of Pawhuska v. Pawhuska Oil and Gas Co., 64 Okl. 214, 166 P. 1058, writ of error dismissed, 250 U.S. 394; and American Indian Oil & Gas Co. v. George F. Collins & Co., 157 Okl. 49, 9 P.2d 438, as supporting their contention. We think those cases are not controlling in the instant case. In City of Bartlesville v. Corporation Commission, supra, the Oklahoma Supreme Court held that the Corporation Commission had the power to change the rates charged by a non-municipal gas company in Bartlesville notwithstanding a home rule city charter provision authorizing the city to fix and regulate such rates. In City of Pawhuska v. Pawhuska Oil & Gas Co., supra, the Oklahoma Supreme Court held that the rate for gas supplied to the inhabitants of Pawhuska by a non-municipal gas company could be changed by the Corporation Commission notwithstanding a provision in the franchise granted by the City to the gas company prior to the time the Corporation Commission was granted power by the Legislature to regulate the rates of public utilities, establishing a maximum rate for gas. And in American Indian Oil and Gas

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3. Realty Mortgage & S. Co. v. Oklahoma Emp. Sec. Com'n., 197 Okl. 308, 169 P.2d 761, 770.

4. Article 18, Section 7 of the Oklahoma Constitution provides in part as follows:

"Nor shall the power to regulate the charges for public services be surrendered; * * *."

Co. v. George F. Collins & Co., supra, the Oklahoma Supreme Court held that a ten-year contract between a non-municipal gas company and a private consumer which established a fixed rate for gas was binding upon the parties so long as no rate had been established by the Corporation Commission, but ceased to be effective as to rates when the Corporation Commission had established rates.

Those cases all involved rate changes made by the Corporation Commission. The rates charged by public utilities in Oklahoma are controlled and regulated by the Corporation Commission.[5] But the Authority is a "body politic"[6] and as such it is expressly excluded from the statutory definition of a public utility[7] and its rates and charges are not subject to control or regulation by the Corporation Commission. The only limitations upon the rate making powers of the Authority are those imposed by the Legislature which appear in 82 Okl. St. Ann. § 868, supra.

Furthermore, each of the cases relied upon by the Authority involve an attempt by the user to fix rates so as to prevent the duly constituted rate making agency designated by the Legislature from performing its rate making duties. In the instant case the Legislature designated the Authority as the agency to fix its own rates, and any rates set by it, whether by contract or otherwise, if set according to law are subject to change only by the Legislature. Hence there was no surrender of the power to regulate as there was in the cases cited by the Authority. Rather there was an exercise of such power.

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5. 17 Okl. St. Ann. § 152.

6. 82 Okl. St. Ann. § 861; International Brotherhood v. Grand River Dam Auth., ... Okl. ....., 292 P.2d 1018, 1019.

7. 17 Okl. St. Ann. § 151.

The Authority further contends that its revenues are inadequate to meet the requirements of § 868, supra, and that therefore the contract is void. We do not agree.

The only evidence in the record as to the insufficiency of the fees and charges made by the Authority was an exhibit which tabulated revenue and expenses for a 5-1/2 year period. That exhibit shows in part the following:

Year	Outstanding Bonds	Total Revenues	Operation & Maintenance	Debt Service
1959	20,767,000.00	4,459,498.46	3,100,320.39	952,446.27
1960	20,951,000.00	4,912,646.18	3,399,790.52	978,016.21
1961	50,000,000.00	4,964,426.27	3,034,510.26	1,056,738.19
1962	50,000,000.00	5,390,983.20	3,870,211.48	643,100.00
1963	50,000,000.00	5,963,719.16	5,628,525.84	643,100.00
1964 (6 mo)	50,000,000.00	3,910,661.09	2,825,829.69	1,336,255.36
Total		29,601,934.36	21,859,188.18	5,609,656.03

Year	Debt. Ser. Res. Fund	Contingency Fund	Depreciation	Gain or Deficit*
1959	35,790.30	50,000.00	607,035.80	286,094.30*
1960	63,695.72	50,000.00	593,070.42	171,926.69*
1961	88,036.95	50,000.00	585,674.55	139,466.32
1962	283,680.63	250,000.00	614,651.16	270,660.07*
1963	283,680.63	250,000.00	617,660.68	1,459,247.99*
1964 (6 mo)	141,840.32	125,000.00	328,803.86	847,068.14*
Total	906,724.55	775,000.00	3,346,896.47	2,895,530.87*

It should be noted that § 868, supra, permits the establishment of depreciation and emergency funds only "out of the revenues which may be received in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d)" of § 868, yet in each of the years in which the above tabulation shows a deficit, there were set up as expense items depreciation and contingency reserve. We think that a contingency fund and an emergency fund are the same.

Revenues in excess of those required for the purposes specified in sub-paragraphs (a), (b), (c) and (d) of § 868, supra, were not available in the amounts charged as expenses for depreciation and emergency in 4-1/2 years. Had such expenses not been so charged, there would have been no deficit in 1950, 1960 and 1962.

Since the Authority decided to set rates for water and steam sold to National by contract for a 25-year period, the Authority was obligated by § 868, supra, when the contract was negotiated to establish rates which would be reasonable and nondiscriminatory and which it then determined would be sufficient to produce revenue adequate to pay operation and maintenance expenses, to pay interest and principal on bonds, to pay sinking and reserve fund payments, and to fulfill the terms of any agreements with bondholders. In other words the Authority was obligated at the time the contract was entered into to determine what rates in its considered judgment would be adequate to meet the requirements of § 868 during the term of the contract and fix the applicable rates accordingly. Presumably it performed that duty and made such determination, and the fact, if it be a fact, that actual experience has shown the prospective determination of the rates, although fully adequate at the beginning of the contract term, later turned out to be inadequate, does not retroactively make the initial determination improper or unlawful and does not render void the contract rates.

National contends the action of the Authority was an impairment of its contract. We do not think the question of impairment of contract is involved. In its usual connotation, impairment of contract means impairment by legislative action. No such action has occurred. The issue rather is one of simple breach of contract.

We conclude the Authority had the power to fix rates for water and steam for a definite term and to contract to furnish water and steam for such period at such fixed rates.

Affirmed.

Judgment

Sixteenth Day, September Term, Wednesday, October 6th, 1965.

Before Honorable Orie L. Phillips, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Order Denying Petition for Rehearing

Second Day, November Term, Tuesday, November 16th, 1965.

Before Honorable Orie L. Phillips, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

**Section 8 of the Grand River Dam Authority Act,
Okl. Session Laws 1935, Ch. 70, P. 354,
82 Okl.St.Ann. §868**

Section 8. Rates and Charges—Fees.

The Board shall establish and collect rates and other charges for the sale or use of water, water connections, power, electric energy or other services sold, furnished, or supplied by the District which fees and charges shall be reasonable and nondiscriminatory and sufficient to produce revenue adequate:

(a) To pay all expenses necessary to the operation and maintenance of the properties and facilities of the District;

(b) To pay the interest on and principal of all bonds issued under this Act when and as the same shall become due and payable;

(c) To pay all sinking fund and/or reserve fund payments agreed to be made in respect of any such bonds, and payable out of such revenues, when and as the same shall become due and payable; and

(d) To fulfill the terms of any agreements made with the holders of such bonds and/or with any person in their behalf. Out of the revenues which may be received in excess of those required for the purposes specified in subparagraphs (a), (b), (c), and (d) above, the Board shall establish a reasonable depreciation and emergency fund, and retire (by purchase and cancellation or redemption) bonds issued under this Act, or apply the same to any corporate purpose. It is the intention of this Act that the rates and charges of the District shall not be in excess of what may be necessary to fulfill the obligations imposed upon it by this Act.

Nothing herein shall be construed as depriving the State of Oklahoma of its power to regulate and control fees and/or charges to be collected for the use of water, water connections, power, electric energy, or other services, provided, that the State of Oklahoma does hereby pledge to and agree with the purchasers and successive holders of the bonds issued hereunder that the State will not limit or alter the power hereby vested in the District to establish and collect such fees and charges as will produce revenues sufficient to pay the items specified in sub-paragraphs (a), (b), (c), and (d) of this Section 8, or in any way to impair the rights or remedies of the holders of the bonds, or of any person in their behalf, until the bonds, together with the interest thereon, with interest on unpaid installments of interest and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders and all other obligations of the District in connection with such bonds are fully met and discharged.